Tun Naing Oo v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION FOR REVISION NO 43–9 OF 2009
YEOH WEE SIAM JC
24 MARCH 2009

Criminal Procedure — Sentence — Excessive sentence — Illegal entry into Malaysia — Applicant a refugee or asylum-seeker — Revision of sentence — Whipping — Whether manifestly excessive — Whether whipping should be spared on humanitarian grounds — Whether whipping reserved only for crimes involving violence and brutalities — Immigration Act 1959/1963 s 6(1)(c)

The applicant, who was of the Chin ethnic group, was an asylum-seeker from Myanmar. He had fled his home state from the military junta and made his way to Malaysia. The applicant was registered with his own community group here ie, the Alliance of Chin Refugees. He was arrested during an operation, Ops Belanja, carried out by the immigration officers at Plaza Low Yat, Kuala Lumpur. At the time of his arrest, the applicant was inside a shop which was carrying on the business of selling and repairing computers and accessories. At the material time, the applicant was selling computer accessories to a customer. The applicant was charged under s 6(1)(c) of the Immigration Act 1959/1963 for entering Malaysia without a valid pass. The sessions court convicted the applicant and sentenced him to 100 days' imprisonment with effect from the date of arrest and two strokes of whipping. The applicant, in applying for a revision of the sentence, sought to set aside the sentence of whipping. He contended that the sentence of whipping would only add to his sufferings. The issue before this court was whether the applicant should be imposed with the punishment of two strokes of whipping in addition to the 100 days' imprisonment imposed on him by the sessions court.

Held, setting aside the sentence of two strokes of whipping:

(1) The punishment of 100 days' imprisonment imposed on the applicant by the sessions court under s 6(3) of the Act was appropriate and legal. In fact, the applicant accepted such punishment and was not even applying for a revision of the sentence (see para 22).

(2) The sentence of two strokes of whipping was manifestly excessive since there was no evidence that the applicant committed a crime of violence

A or brutality at the time he was arrested. There was no doubt that he was present in Malaysia illegally but he was not carrying out any violent act; he was merely selling computer accessories to a customer, a very benign activity (see para 23).

B (3) Further, from the *New Straits Times* press report dated 14 February 2005, the attorney general, as the public prosecutor of this country, was not pressing for the sentence of whipping under s 6(3) of the Act unless the accused was a habitual offender or had been involved in crimes that threatened public order. In the present case, there was no evidence that the applicant was guilty of either or both of those two offences (see para C 26).

(4) Going by humanitarian grounds, it is not humane to give an asylum-seeker or refugee two strokes of whipping. Such person is already running away from his own country to avoid pressure and D persecution. It served no purpose to whip him and add to his suffering when, after serving the sentence of imprisonment, the applicant would be deported. In any event, the UNHCR was now seeking to assist the applicant and finally to get him resettled in a suitable country (see para 32).

E **Observation**

Asylum-seekers and refugees, if they have not committed acts of violence or brutality, or were habitual offenders, or have threatened our public order, should not be punished with whipping. However, such persons could help F themselves by giving documentary proof of their registration with their own community here or with the UNHCR office in Kuala Lumpur to satisfy the subordinate courts that they are genuine asylum-seekers or refugees who are only waiting to resettle. That would, hopefully, avert future cases of whipping being imposed as a sentence for similar offences.

G **[Bahasa Malaysia summary**

Pemohon, berketurunan bangsa etnik Chin, merupakan pemohon suaka dari Myanmar. Dia melarikan diri dari tanah airnya daripada junta ketenteraan ke H Malaysia. Pemohon berdaftar dengan komuniti etniknya di sini, iaitu Alliance of Chin Refugees. Dia ditahan semasa suatu operasi, Ops Belanja yang dijalankan oleh pegawai-pegawai imigresen di Plaza Low Yat, Kuala Lumpur. Pada masa penangkapannya, pemohon berada dalam sebuah kedai yang menjalankan perniagaan menjual dan membaiki komputer dan aksesori. I Pada masa yang material, pemohon sedang menjual aksesori komputer kepada seorang pelanggan. Pemohon dituduh di bawah s 6(1)(c) Akta Imigresen 1959/1963 atas kesalahan masuk ke Malaysia tanpa pas yang sah. Mahkamah sesyen mensabitkan pemohon dan memberi hukuman penjara 100 hari berkuat kuasa dari tarikh penangkapan dan dua kali sebatan.

Pemohon, dalam memohon semakan hukuman, memohon untuk pengetepian hukuman sebatan. Pemohon berhujah bahawa hukuman sebatan akan hanya menambahkan penderitaannya. Isu di hadapan mahkamah ini ialah sama ada pemohon patut dihukum dengan dua kali sebatan sebagai tambahan kepada hukuman penjara 100 hari yang dikenakan oleh mahkamah sesyen.

Diputuskan, menolak hukuman dua kali sebatan:

(1) Hukuman penjara 100 hari yang dikenakan kepada pemohon oleh mahkamah sesyen di bawah s 6(3) Akta adalah wajar dan sah di sisi undang-undang. Malahan, pemohon akur dengan hukuman tersebut dan tidak langsung memohon semakan untuk hukuman tersebut (lihat perenggan 22).

(2) Hukuman dua kali sebatan jelasnya keterlaluan kerana tiada keterangan yang menunjukkan pemohon melakukan jenayah ganas dan kejam pada masa dia ditangkap. Tidak diragui bahawa dia di Malaysia secara haram tetapi dia tidak melakukan apa-apa perbuatan ganas, dia hanya menjual aksesori komputer kepada pelanggan, suatu aktiviti yang tidak berbahaya (lihat perenggan 23).

(3) Selanjutnya, daripada laporan akhbar *New Straits Times* pada 14 Februari 2005, peguam negara, sebagai pendakwa raya negara ini, tidak akan mendesak untuk hukuman sebatan di bawah s 6(3) Akta kecuali tertuduh merupakan kaki pelaku jenayah atau terlibat dalam jenayah yang menggugat ketenteraman awam. Dalam kes ini, tiada keterangan menunjukkan bahawa pemohon bersalah atas kedua-dua atau salah satu jenayah tersebut (lihat perenggan 26).

(4) Atas dasar kemanusiaan, adalah tidak berperikemanusiaan untuk menghukum pemohon suaka atau seorang pelarian dengan dua kali sebatan. Dia melarikan diri dari negaranya sendiri untuk mengelak tekanan dan penindasan. Dengan menghukumnya dengan sebatan dan menambah penderitaannya, tidak akan memberi apa-apa pengajaran kerana dia akan dideportasi. Dalam apa jua keadaan, UNHCR kini membantu pemohon dan akan mencari kediaman yang sesuai baginya di negara lain (lihat perenggan 32).

Pemerhatian

Pemohon suaka dan pelarian, jika mereka tidak melakukan jenayah ganas atau kejam, atau merupakan kaki pelaku jenayah, atau mengancam ketenteramaan awam, tidak seharusnya dihukum dengan sebatan. Walau bagaimanapun, seseorang itu boleh membantu dirinya dengan memberikan bukti-bukti dokumentar pendaftaran dengan komunitinya di sini atau dengan pejabat UNHCR di Kuala Lumpur untuk memuaskan mahkamah

A rendah bahawa mereka adalah pemohon suaka atau pelarian sebenar-benarnya yang hanya menanti penempatan semula. Bukti-bukti tersebut tentunya akan mengelakkan hukuman sebatan dikenakan atas kes-kes yang serupa di masa hadapan.]

B **Notes**

For cases on excessive sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3654–3671.

Cases referred to

C *Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83, FC (refd)
Jayanathan v PP [1973] 2 MLJ 68, FC (refd)
Kya Hliang & Ors v Pendakwa Raya [2009] MLJU 8, HC (refd)
Leong Kok Huat v PP [1998] 6 MLJ 406; [1998] 4 CLJ 106, HC (refd)
D *Pitting bin Hj Mohamed Ali v PP* [1979] 2 MLJ 136, HC (refd)
PP v Man bin Ismail [1939] MLJ 207, HC (refd)
PP v Wahab [1964] MLJ 265, HC (refd)
Subramaniam Subakaran v PP [2007] 1 CLJ 470, HC (refd)

E **Legislation referred to**

Courts of Judicature Act 1964 ss 31, 35, 36
Criminal Procedure Code ss 323, 324, 325, 326, 327
Immigration Act 1959/1963 s 6(1)(c), (3)

F *Renuka T Balasubramaniam (T Balasubramaniam) for the applicant.*
Ahmad Kamal bin Roslan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Shalini Pillay (Legal Officer, UNHCR) watching brief.

G **Yeoh Wee Siam JC:**

[1] On 20 March 2009 this court received a letter dated 17 March 2009 from Messrs T Balasubramaniam, the advocates and solicitors for Tun Naing
H Oo, a Myannmar national ('the applicant'), informing the court that the applicant was sentenced by the Sessions Court, Semenyih, Selangor ('the sessions court') on 13 March 2009 for an offence under s 6(1)(c) of the Immigration Act 1959/1963 to 100 days' imprisonment with effect from the date of arrest and two strokes of whipping.

I

[2] In the same letter, the applicant applied for a revision of the sentence for the following reasons:

(a) the punishment of whipping is based on the discretion of the court;

(b) the applicant is a refugee from Myanmar and has just been registered with the United Nations High Commissioner For Refugees ('UNHCR'); and

(c) the applicant is facing pressure and persecution in his own country which resulted in him running away. The sentence of whipping would only add to his sufferings.

[3] The applicant is applying to this court for the sentence of whipping to be set aside.

[4] Based on the initial merits of the case as disclosed above, the court allowed the applicant's application to be registered as a criminal application for revision case. This case is also the second application for revision that is registered with this court since the opening of the court in Petaling Jaya on 4 March 2009.

[5] The powers of the High Court for revision in respect of criminal proceedings and matters in the subordinate courts are provided in ss 31, 35 and 36 of the Courts of Judicature Act 1964. Similar powers of revision are also provided in ss 323– 327 of Chapter XXX1 of the Criminal Procedure Code (Act 593) as follows:

323 Powers to call for records of subordinate Courts

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.

...

324 Power to order further inquiry

(1) On examining any record under section 323 or otherwise, a Judge may direct the Magistrate to make, and the Magistrate shall make, further inquiry into any complaint which has been dismissed under section 135, or into the case of any accused person who has been discharged

...

325 Powers of Judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

A (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

B

326 Permission for parties to appear

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision:

C

Provided that the Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection 325(2).

D

327 Orders on revision

When a case is revised under this Chapter by a Judge he shall certify his decision or order to the Court by which the finding, sentence or order revised was recorded or passed stating, where the finding, sentence or order has been varied, the grounds for such variation; and the Court to which the decision or order is so certified shall then make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith.

E

[6] On 24 March 2009 I received the record of proceedings which I had earlier called for, for the purpose of satisfying myself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the sessions court. The hearing of the application was heard on the same day.

F

[7] Ms Renuka T Balasubramaniam of Messrs T Balasubramaniam, appeared on behalf of the applicant. Tuan Ahmad Kamal bin Roslan, the deputy public prosecutor ('DPP'), appeared on behalf of the public prosecutor, the respondent in this case.

G

[8] The court notes from the records that the applicant was charged in the sessions court on 13 March 2009 as follows:

H

Bahawa kamu pada 29.01.2009 jam lebih kurang 05.15 PETANG beralamat di JAYACOM INFORMATION SDN BHD, 3-IT-1B, 3RD FLOOR PLAZA LOW YATT OFF JALAN BUKIT BINTANG 55100 KUALA LUMPUR dalam DAERAH DANG WANGI dalam BANDARAYA KUALA LUMPUR, WILAYAH PERSEKUTUAN KUALA LUMPUR sebagai seorang bukan warganegara Malaysia didapati masuk tanpa suatu pas yang sah. Oleh itu kamu telah melanggar s 6(1)(c) Akta Imigresen 1959/63 (Pindaan 2002) merupakan suatu kesalahan yang boleh dihukum di bawah s 6(3) Akta yang sama.

I

[9] During the hearing, Ms Renuka submitted to this court that the punishment of whipping under s 6(3) of the Immigration Act 1959/1963 ('the Act') is not mandatory because of the words used in the section ie '*shall also be liable*'.

Section 6(3) of the Act provides as follows:

> Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding 5 years or to both, and shall also be liable to whipping of not more than six strokes.

[10] The DPP in his submissions also agreed that whipping is not mandatory under s 6(3) of the Act. It is within the discretionary powers of the court to decide whether to impose whipping or otherwise.

[11] The court agrees with both learned counsel for the applicant and the DPP that '*shall ... be liable*' has been interpreted and decided in many cases that it is discretionary and not mandatory (see Harun J's decision in *Public Prosecutor v Wahab* [1964] MLJ 265, the Federal Court case of *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68, *Public Prosecutor v Man bin Ismail* [1939] MLJ 207 and *Leong Kok Huat v Public Prosecutor* [1998] 6 MLJ 406; [1998] 4 CLJ 106). Therefore, the punishment of whipping under s 6(3) of the Act is entirely left to judicial discretion.

[12] The issue now is whether the applicant should be imposed with the punishment of two strokes of whipping in addition to the 100 days' imprisonment imposed on him by the sessions court.

[13] Ms Renuka brought to the court's attention that the applicant is an asylum-seeker from Myanmar. He entered this country five months ago. He is of the Chin ethnic group and fled his home state when members of the military junta approached his home and came looking for him, alleging that he is a member of the rebel group. She stated that it is common knowledge in the applicant's village that persons detained by the military junta are never seen again. Based on a tip-off from the village headman, the applicant ran away and made his way to Malaysia.

[14] Ms Renuka also informed the court that the applicant is registered with his own community group here ie the Alliance of Chin Refugees ('ACR'). The whole process of registering with the UNHCR takes about two years, with several interviews. As a result, the first step an asylum-seeker does is to register with his community group which assists in processing his claims with the UNHCR. Since the applicant's detention, preliminary investigations

A have been carried out. At present it is clear that the applicant qualifies as a refugee but this has to be finalised with the UNHCR.

[15] Ms Renuka submitted that the purpose of the application is therefore purely on humanitarian grounds.

B

[16] The DPP submitted that the only basis for this court to interfere with the decision of the sessions court is whether the sentence imposed is manifestly excessive (see Federal Court case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, Criminal Appeal No 33 of 1981).

C

[17] The DPP also submitted that the next issue is whether the sessions court had erred in law when he imposed the two strokes of whipping. According to him, the notes of proceedings contain no evidence to show that the sessions court judge had exercised his discretion inappropriately. In any

D case, the applicant did not produce any documents before the sessions court to support his claim that he is registered with the UNHCR. The DPP further submitted that it would be dangerous to allow a claim that one is a refugee by a mere allegation without documentary proof. This would set precedent for all other refugees to come to court and ask for the punishment of

E whipping to be set aside based on oral confessions or allegations that they are refugees registered with the UNHCR.

[18] While the court agrees fully with the learned DPP's submissions, the

F court decided to determine this application for revision based on the following two main questions:

(a) whether the punishment of whipping is manifestly excessive to render it incorrect, illegal or improper under s 323 of the Criminal Procedure Code; and

G

(b) whether the applicant should be spared the two strokes of whipping on humanitarian grounds for the reason that he is an asylum-seeker or a refugee.

H **[19]** Regarding the first question (a) above, there is ample case law stating that the punishment of whipping is to be reserved only for crimes involving violence and brutalities (see *Kya Hliang & Ors v Pendakwa Raya* [2009] MLJU 8 Criminal Review No (MT–1) 43–1 of 2009, High Court Johor Bahru, and *Pitting bin Hj Mohamed Ali v Public Prosecutor* [1979] 2 MLJ

I 136, High Court Singapore, KL-Criminal Appeal No 7 of 1956).

[20] In the present case, based on the facts as disclosed in the police report dated 29 January 2009 (P2), the court finds that the applicant was arrested during an operation, Ops Belanja, carried out by seven immigration officers

at Plaza Low Yat, Kuala Lumpur. At the time of his arrest, the applicant was inside the shop, Jayacom Information Sdn Bhd, which is carrying on the business of selling and repairing computers and accessories. The applicant was detained together with two other males from Myanmar and one female from Indonesia. The applicant was then selling computer accessories to a customer. He did not hold a passport at the time of his arrest.

[21] The facts show clearly that the applicant had entered Malaysia without a valid pass and therefore he had committed the offence for which he is charged.

[22] The court finds the punishment of 100 days' imprisonment imposed on the applicant by the sessions court under s 6(3) of the Act appropriate and legal. In fact, the applicant accepts such punishment and is not even applying for a revision of the sentence.

[23] However, the court finds that the sentence of two strokes of whipping is manifestly excessive since there is no evidence that the applicant was committing a crime of violence or brutality at the time that he was arrested. There is no doubt that he was present in Malaysia illegally but he was not carrying out any violent act; he was merely selling computer accessories to a customer, a very benign activity.

[24] For this reason, the court is satisfied that the sentence of two strokes of whipping, being manifestly excessive, is therefore incorrect and improper and ought to be revised and set aside.

[25] Regarding the second question in (b) above, the court bears in mind the *New Straits Times* newspaper extract dated 14 February 2005 tendered by learned counsel for the applicant. There it was reported that the honourable attorney general of Malaysia, Tan Sri Abdul Ghani Patail ('the AG') stated that the law does not make caning mandatory for convicted illegal immigrants. He said those found guilty and sentenced to caning by the court were among immigrants who had committed the offence repeatedly or had been involved in crimes that threatened public order. The AG said that Malaysia accorded humanitarian treatment to immigrants and exercised care, although the immigrants had committed an offence under the immigration Act by entering the country illegally. He also said that prosecution was not a priority for the authorities because if all the cases involving thousands of detained immigrants were taken to court, the prisons would be filled.

[26] From the above press report, it is clear that the AG, as the public prosecutor of this country, is not pressing for the sentence of whipping under s 6(3) of the Act unless the accused is a habitual offender or has been involved

in crimes that threatened public order. In the present case, there is no evidence that the applicant is guilty of either or both of those two offences.

[27] Learned counsel for the applicant submitted that Malaysia is not a party to the Convention relating to the status of refugees which was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the status of refugees and stateless persons, and which entered into force on 22 April 1954 ('the 1951 Convention'). Therefore, Malaysia has no obligations towards making local laws for the protection of refugees. However, Malaysia has permitted the UNHCR to maintain an office here for registering asylum seekers.

[28] The legal position for asylum seekers or refugees in Malaysia is that they are still subject to our domestic laws, including the Act (see *Subramaniam Subakaran v Public Prosecutor* [2007] 1 CLJ 470). Every refugee has duties to the country to which he finds himself, which requires him in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order (see article 2 of the 1951 Convention, under 'General Obligations').

[29] The question now is how therefore should the applicant be sentenced by the court for the offence that he has committed.

[30] Ms Shalini Pillay, protection assistant or legal officer at the UNHCR Kuala Lumpur office, in her capacity as amicus curiae, informed the court that the UNHCR got to know of the applicant because he was registered with his own community which informed the UNHCR of his arrest. She stated that the UNHCR would like to schedule a full interview with the applicant to see the merits of his claim with UNHCR and to find a durable solution for him, which includes resettlement. Ms Shalini also asked for the court's indulgence in setting aside the whipping on humanitarian grounds.

[31] Ms Renuka then informed the court that she is being instructed by the UNHCR.

[32] Going by humanitarian grounds, it is not humane to give an asylum-seeker or refugee two strokes of whipping. Such person is already running away from his own country to avoid pressure and persecution. It serves no purpose to whip him and add to his suffering when, as learned counsel for the applicant stated, after serving his sentence of imprisonment, the applicant would be deported. In any event, the UNHCR is now seeking to assist the applicant and finally to get him resettled in a suitable country.

[33] This court is therefore of the firm opinion that asylum-seekers and refugees, if they have not committed acts of violence or brutality, or are habitual offenders, or have threatened our public order, should not be punished with whipping. However, such persons can help themselves by giving documentary proof of their registration with their own community here or with the UNHCR office in Kuala Lumpur to satisfy the subordinate courts that they are genuine asylum-seekers or refugees who are only waiting to resettled. That would, hopefully, avert future cases of whipping being imposed as a sentence for similar offences.

[34] For the above reasons, I exercised my powers of revision under the above sections of the Courts of Judicature Act 1964 and the Criminal Procedure Code, and accordingly set aside the sentence of two strokes of whipping on the applicant. However, the sentence of 100 days' imprisonment remains.

Sentence of two strokes of whipping set aside.

Reported by Ashgar Ali Ali Mohamed